

REMARKS/ARGUMENTS

This application has been carefully reviewed in view of the Office Action dated July 31, 2006. Claims 1-5, 8, 9, and 13-18 are pending. Claims 10-12 and 9-20 are cancelled, without prejudice; in order to advance prosecution in the instant application with the subject matter of the cancelled claims to be pursued in a continuation application.

The Office Action rejected claims 8, 9 and 16-18 under 35 USC 112, first paragraph, on the basis that there did not appear to be any suggestion that the flow tube extends through the dispenser body and the fluid container at least partially towards central portions of the dispenser body and the fluid container. However, FIGS. 2, 3 and 5 clearly show the uppermost portion of the flow tube extending through the dispenser body and the fluid container at least partially towards central portions of the dispenser body and the fluid container. Therefore, it is respectfully requested that the rejection of claims 8, 9 and 16-18 and the objections to the drawings be withdrawn.

The rejections under 35 USC 112, first paragraph, of claims 10 and 19, with respect to the planar cap plate, and claims 12 and 20, with respect to the spacer, are moot in view of the cancellation, without prejudice, of those claims. Without waiver, MPEP 2163 III A provides as follows:

A description as filed is presumed to be adequate, unless or until sufficient evidence or reasoning to the contrary has been presented by the examiner to rebut the presumption. See, e.g., *In re Marzocchi*, 439 F.2d 220, 224, 169 USPQ 367, 370 (CCPA 1971). The examiner, therefore, must have a reasonable basis to challenge the adequacy of the written description. The examiner has the initial burden of presenting by a preponderance of evidence why a person skilled in the art would not recognize in an applicant's disclosure a description of the invention defined by the claims. *Wertheim*, 541 F.2d at 263, 191 USPQ at 97. In rejecting a claim, the examiner must set forth express findings of fact regarding the above analysis which support the lack of written description conclusion. These findings should:

(A) Identify the claim limitation at issue; and
(B) Establish a *prima facie* case by providing reasons why a person skilled in the art at the time the application was filed would not have recognized that the inventor was in possession of the invention as claimed in view of the disclosure of the application as filed. A general allegation of "unpredictability in the art" is not a sufficient reason to support a rejection for lack of adequate written description. When appropriate, suggest amendments to the claims which can be supported by the application's written description, being mindful of the prohibition against the addition of new matter in the claims or description. See *Rasmussen*, 650 F.2d at 1214, 211 USPQ at 326.

The Office Action merely presented conclusory statements that there was not any suggestion in the specification, as filed, for claims 10, 12, 19 and 20. The Office Action failed to set forth, by a preponderance of evidence that included express findings of fact, why a person skilled in the art would not recognize in the applicant's disclosure a description of the invention defined by the claims.

CONCLUSION

A Notice of Allowance is respectfully requested in view of the arguments and amendments outlined above.

Respectfully submitted,

KELLY LOWRY & KELLEY, LLP

/Matthew J. Spark/

Matthew J. Spark
Registration No. 43,453

MJS:cw/jc
6320 Canoga Avenue, Suite 1650
Woodland Hills, California 91367
(818) 347-7900